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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Feb 01, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LONNIE M.,

No. 1:20-CV-03039-JTR

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 17. Attorney D. James Tree represents Lonnie M. (Plaintiff); Special Assistant United States Attorney Franco Bacia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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ORDER GRANTING DEFENDANT'S MOTION . . . - 1

## 1 JURISDICTION

2 Plaintiff filed an application for Supplemental Security Income on March 26,  
3 2014, alleging disability beginning June 1, 2012 due to Hepatitis B and C, asthma,  
4 bipolar disorder, COPD, chronic migraines, and foot infection. Tr. 64. The  
5 application was denied initially and upon reconsideration. Tr. 91-99, 107-15.  
6 Administrative Law Judge (ALJ) Virginia Robinson held a hearing on May 18,  
7 2016, Tr. 34-65, and issued an unfavorable decision on December 21, 2016, Tr. 19-  
8 27. Plaintiff requested review by the Appeals Council and the Appeals Council  
9 denied the request on January 27, 2018. Tr. 1-5. Plaintiff filed a civil action in this  
10 court on March 29, 2018. Tr. 506-08. On October 29, 2018, the Court granted the  
11 parties' stipulated motion to remand for further proceedings. Tr. 518-19.

12 ALJ Robinson held a remand hearing on November 5, 2019, Tr. 446-82, and  
13 issued a partially favorable decision on January 14, 2020, finding Plaintiff was not  
14 disabled prior to January 8, 2019, but became disabled on that date when he  
15 changed age categories. Tr. 388-404. The Appeals Council did not review the  
16 claim and the ALJ's January 2020 decision became the final decision of the  
17 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
18 405(g). Tr. 383-85. Plaintiff filed this action for judicial review on March 31,  
19 2020. ECF No. 1.

## 20 STATEMENT OF FACTS

21 Plaintiff was born in 1969 and was 45 years old when he filed his claim. Tr.  
22 64. He had a difficult childhood, with both of his parents experiencing mental  
23 illness and Plaintiff being subjected to physical and emotional abuse. Tr. 291, 296,  
24 428, 683. He completed the 8th grade and did not obtain his GED. Tr. 297, 427.  
25 Plaintiff has a minimal work history, having worked primarily short-term jobs  
26 doing siding work. Tr. 172, 185, 437. He struggled with substance addiction most  
27 of his life until December 2017. Tr. 433-35, 465, 956-58.

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## 1 STANDARD OF REVIEW

2 The ALJ is responsible for determining credibility, resolving conflicts in  
3 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
4 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
5 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
6 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
7 only if it is not supported by substantial evidence or if it is based on legal error.  
8 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
9 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
10 1098. Put another way, substantial evidence is such relevant evidence as a  
11 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
12 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
13 rational interpretation, the Court may not substitute its judgment for that of the  
14 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
15 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
16 administrative findings, or if conflicting evidence supports a finding of either  
17 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
18 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
19 supported by substantial evidence will be set aside if the proper legal standards  
20 were not applied in weighing the evidence and making the decision. *Brawner v.*  
21 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## 22 SEQUENTIAL EVALUATION PROCESS

23 The Commissioner has established a five-step sequential evaluation process  
24 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*  
25 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
26 proof rests upon the claimant to establish a *prima facie* case of entitlement to  
27 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a  
28 claimant establishes that a physical or mental impairment prevents the claimant

1 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant  
2 cannot perform past relevant work, the ALJ proceeds to step five, and the burden  
3 shifts to the Commissioner to show (1) the claimant can make an adjustment to  
4 other work; and (2) the claimant can perform specific jobs that exist in the national  
5 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir.  
6 2004). If a claimant cannot make an adjustment to other work in the national  
7 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

## 8 ADMINISTRATIVE FINDINGS

9 On January 14, 2020, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act prior to January 8, 2019, but that he  
11 became disabled on that date.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
13 activity since the application date. Tr. 391.

14 At step two, the ALJ determined Plaintiff had the following severe  
15 impairments: COPD, affective disorder (major depressive disorder vs. bipolar  
16 disorder), anxiety related disorder, and substance use disorder. *Id.*

17 At step three, the ALJ found Plaintiff did not have an impairment or  
18 combination of impairments that met or medically equaled the severity of one of  
19 the listed impairments. Tr. 392-94.

20 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
21 that prior to March 23, 2018, he could perform light exertional work with some  
22 exceptions:

23 The claimant could occasionally climb ramps or stairs, but never  
24 climb ladders, ropes, or scaffolds, and needed to avoid concentrated  
25 exposure to extreme cold, extreme heat, excessive vibration, and  
26 workplace hazards such as working with dangerous machinery and  
27 working at unprotected heights. He needed to avoid even moderate  
28 exposure to pulmonary irritants such as fumes, odors, dust, and gases.  
The claimant could perform simple routine tasks, in a routine work

1 environment with simple work related decisions, and could have only  
2 superficial interaction with coworkers and occasional, superficial  
3 interaction with the public. In the workplace the claimant required a  
4 break area where during his normal break periods he could leave his  
work area and elevate his legs.

5 Tr. 394-95. The ALJ further found that beginning on March 23, 2018, Plaintiff was  
6 limited to performing sedentary work, based on an opinion provided by treating  
7 doctor, Caryn Jackson, which limited Plaintiff to performing sedentary work due to  
8 his marked impairments from COPD and various other conditions. Tr. 401, 670-71.

9 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 402.

10 At step five, the ALJ determined that, based on the testimony of the  
11 vocational expert, and considering Plaintiff's age, education, work experience, and  
12 RFC, Plaintiff was capable of performing jobs that existed in significant numbers  
13 in the national economy, including the jobs of cleaner housekeeping, small  
14 products assembler, marker II, hand packager, and surveillance system monitor. Tr.  
15 402-03.

16 On January 8, 2019, Plaintiff's age category changed, and the ALJ found  
17 him to be disabled under the Medical Vocational Guidelines. Tr. 403.

18 The ALJ thus concluded Plaintiff was not under a disability within the  
19 meaning of the Social Security Act at any time from the application date through  
20 January 8, 2019, and that he subsequently became disabled on that date. Tr. 404.

## 21 ISSUES

22 The question presented is whether substantial evidence supports the ALJ's  
23 decision denying benefits and, if so, whether that decision is based on proper legal  
24 standards.

25 Plaintiff contends the ALJ erred by (1) improperly rejecting Plaintiff's  
26 symptom testimony; (2) improperly evaluating the medical opinion evidence from  
27 ARNP Wheeler; and (3) improperly evaluating Listing 3.02.

## DISCUSSION

### 1. Plaintiff's symptom statements

Plaintiff alleges the ALJ erred in rejecting his symptom testimony without providing adequate reasons. ECF No. 16 at 7-14.

It is the province of the ALJ to make determinations regarding a claimant's subjective complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

The ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, she found Plaintiff's statements concerning the intensity, persistence and limiting effects of his symptoms were not fully supported. Tr. 395. Specifically, the ALJ found Plaintiff's subjective complaints to be undermined by inconsistent statements from his treating providers, the minimal and mild findings on examination for both his physical and mental conditions, the relief he received from treatments, and his inconsistent statements regarding his use of drugs. Tr. 395-98.

Plaintiff argues the ALJ selectively cited the record, omitting evidence that was supportive of Plaintiff's allegations, and argues that the objective exam findings were less severe due to Plaintiff not working and remaining reclined for most of his days. ECF No. 16 at 8-9. He further argues the evidence of improvement in the record did not mean that his condition did not continue to impair his abilities. *Id.* at 10-11. Finally, he argues his disability claim is not based primarily on pain, and the ALJ therefore erred in discrediting him based on him not presenting in pain or distress at his appointments. *Id.* at 12. Defendant argues the ALJ's findings are supported by substantial evidence and Plaintiff's alternative

1 interpretation of the evidence does not render the ALJ's interpretation invalid. ECF  
2 No. 17 at 6-15.

3 The Court finds the ALJ offered clear and convincing reasons for  
4 discounting Plaintiff's subjective complaints. Plaintiff testified the swelling of his  
5 feet was a significant barrier to working. Tr. 423-24, 457-58. However, the ALJ  
6 noted Plaintiff's treating provider, ARNP Wheeler, did not mention any concerns  
7 with edema, and the exam findings throughout the record only occasionally noted  
8 any issues with swelling. Tr. 396. These conclusions are supported by substantial  
9 evidence. Tr. 704. Plaintiff reported no problems with swelling for the year and a  
10 half prior to his hearing. Tr. 835-39 (April 2018, last chronological report of  
11 swelling in legs); 734, 746, 1276, 1280, 1287, 1294 (subsequent exams showing no  
12 edema). An ALJ may cite inconsistencies between a claimant's testimony and the  
13 objective medical evidence in discounting the claimant's symptom statements.

14 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009).  
15 Similarly, the ALJ reasonably interpreted the mental health records as  
16 demonstrating minimal psychiatric observations, inconsistent with Plaintiff's  
17 allegations of disabling mental health symptoms. Tr. 397-98.

18 In evaluating a claimant's subjective complaints, an ALJ may consider the  
19 medications and other treatments an individual receives, along with their  
20 effectiveness. Social Security Ruling 16-3p. The ALJ reasonably concluded that  
21 Plaintiff's breathing issues were largely controlled by his medications, outside of  
22 some acute flares. Tr. 396-97; *see* 273, 680, 741, 750, 1008, 1199, 1209, 1237,  
23 1280, 1292, 1304.

24 The ALJ also reasonably found Plaintiff made inconsistent statements about  
25 his past substance use history, a factor that an ALJ may properly consider in  
26 assessing the reliability of a claimant's subjective complaints. *Verduzco v. Apfel*,  
27 188 F.3d 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony  
28 concerning alcohol or drug use can contribute to an adverse credibility finding).

1       While Plaintiff offers an alternative interpretation of the record, the Court  
 2 finds the ALJ's interpretation is reasonable and supported by substantial evidence.  
 3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) ("If the evidence can  
 4 reasonably support either affirming or reversing a decision, we may not substitute  
 5 our judgment for that of the Commissioner.").

6       **2. ARNP Wheeler**

7       Plaintiff argues the ALJ improperly weighed the opinion from treating  
 8 ARNP Marybeth Wheeler. ECF No. 16 at 14-16.

9       An ALJ may discount the opinion of a non-acceptable medical source, such  
 10 as a nurse practitioner, if they provide "reasons germane to each witness for doing  
 11 so." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

12       In August 2019, Plaintiff's treating provider, Marybeth Wheeler, ARNP,  
 13 completed a medical source statement. Tr. 704-06. She noted Plaintiff's conditions  
 14 included COPD, hyperlipidemia, asthma, depression, and PTSD. Tr. 704. She  
 15 opined he was capable of light work and would be likely to miss four or more days  
 16 of work per month due to exacerbations of his respiratory state, and that full-time  
 17 work would cause his pulmonary function to deteriorate. Tr. 705. She opined the  
 18 limitations had existed since June 2012. Tr. 706.

19       The ALJ gave this opinion some weight. Tr. 401-02. She found that by this  
 20 point in time Plaintiff was limited to sedentary work, based on physical exam  
 21 findings and the opinion from Dr. Jackson. *Id.* She further reasoned that it  
 22 appeared Ms. Wheeler relied on Plaintiff's subjective reports, as the treatment  
 23 record did not support the frequency of respiratory exacerbations that Ms. Wheeler  
 24 alluded to, and Ms. Wheeler did not have treatment records to support her opinion  
 25 that Plaintiff's impairments had existed at that level since 2012. *Id.* Finally, the  
 26 ALJ found the form did not provide any basis for concluding work would cause  
 27 Plaintiff's condition to deteriorate. *Id.*

28       ///

1 Plaintiff argues the ALJ had no basis for finding Ms. Wheeler unduly relied  
2 on Plaintiff's reports, as Ms. Wheeler noted Plaintiff's diagnoses, symptoms, and  
3 treatment course, all of which would have contributed to her opinion. ECF No. 16  
4 at 15. He further argues the ALJ did not have the medical expertise to claim that  
5 the avoidance of pulmonary irritants and limitation to sedentary work would be  
6 sufficient to avoid pulmonary stress. *Id.* at 16. Defendant argues the ALJ's  
7 rationale was germane and supported by substantial evidence. ECF No. 17 at 15-  
8 18.

9 The Court finds the ALJ offered germane reasons for discounting Ms.  
10 Wheeler's opinion. The ALJ's finding that the record did not reflect exacerbations  
11 of Plaintiff's breathing problem at the rate Ms. Wheeler noted is supported by  
12 substantial evidence. Inconsistency with the medical evidence is a germane reason  
13 for rejecting such evidence. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th  
14 2005). The ALJ also reasonably noted Ms. Wheeler's brief treatment record and  
15 lack of basis for relating her limitations back to 2012 when Plaintiff had only been  
16 treated at the clinic since 2017. Finally, an ALJ may reasonably consider the  
17 amount of explanation and supportive evidence provided by a source in evaluating  
18 the weight to be assigned. 20 C.F.R. §§ 416.927(c)(3), 416.927(f)(1). The ALJ  
19 found Ms. Wheeler's opinion lacked a basis for concluding work would cause  
20 Plaintiff's pulmonary function to deteriorate. This finding is reasonable based on  
21 the form completed. Tr. 704-06.

22 **3. Listing 3.02**

23 At step three of the sequential evaluation process, the ALJ considers whether  
24 one or more of the claimant's impairments meets or equals an impairment listed in  
25 Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 416.920(a)(4)(iii). Each  
26 Listing sets forth the "symptoms, signs, and laboratory findings" which must be  
27 established for a claimant's impairment to meet the Listing. *Tackett v. Apfel*, 180  
28

1 F.3d 1094, 1099 (9th Cir. 1999). If a condition meets or equals a Listing, the  
2 claimant is considered disabled without further inquiry. 20 C.F.R. § 416.920(d).

3 Listing 3.02 addresses chronic respiratory disorders due to any cause, other  
4 than cystic fibrosis, with a showing of spirometry FEV<sub>1</sub> less than or equal to a  
5 particular value based on the claimant's age, gender, and height. 20 C.F.R. Part  
6 404, Subpart P, Appendix 1, § 3.02(a) (Listing 3.02).<sup>1</sup> For an adult male 73 inches  
7 tall, such as Plaintiff, the listing-level FEV<sub>1</sub> is 1.90. Listing 3.02(a). The Listing  
8 further explains that spirometry testing must be done when the claimant is  
9 medically stable, and if the reading is less than 70 percent of the predicted normal  
10 value, repeat testing must be done after inhalation of a bronchodilator. Listing  
11 3.00E.

12 The ALJ found only two listing-level FEV<sub>1</sub> readings in the record were  
13 made after the use of a bronchodilator, and neither was taken during a period of  
14 stability as required by the listing. Tr. 393.

15 Plaintiff contends his breathing problems satisfy the requirements of Listing  
16 3.02(a) based on his FEV<sub>1</sub> readings in June and July 2017. ECF No. 16 at 17. He  
17 argues these test results are consistent with the many findings throughout the  
18 record of severe chronic pulmonary insufficiency. *Id.* Defendant argues the ALJ's  
19 findings were correct and Plaintiff did not meet his burden of demonstrating the  
20 Listing was met. ECF No. 17 at 18-19.

21 The Court finds the ALJ did not err. Plaintiff did not address the ALJ's  
22 finding that the two listing-level FEV<sub>1</sub> findings were made during or soon after an  
23 acute exacerbation and therefore not during a period of stability. The record  
24 reflects the June and July 2017 readings were from a period of time when Plaintiff  
25

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26 <sup>1</sup> Listing 3.02 also has parts (b), (c), and (d). Plaintiff advanced no argument  
27 that his condition satisfies any of those sections of the listing. Therefore, only part  
28 (a) shall be addressed.

1 ran out of his inhalers and had changes in his medications due to insurance. Tr.  
2 1208-10, 1308-17. By August and September, Plaintiff was showing significant  
3 improvement. Tr. 1300-06. The ALJ's conclusion that the listing-level FEV<sub>1</sub>  
4 measures did not occur during a period of stability is supported by substantial  
5 evidence. Therefore, the ALJ did not err in concluding the requirements of Listing  
6 3.02(a) were not met.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court finds the  
9 ALJ's decision is supported by substantial evidence and free of legal error.

10 Therefore, **IT IS HEREBY ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

14 The District Court Executive is directed to file this Order and provide a copy  
15 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant  
16 and the file shall be **CLOSED**.

17 **IT IS SO ORDERED.**

18 DATED February 1, 2021.



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A handwritten signature in black ink, appearing to read "M" or "John T. Rodgers".

19  
20 JOHN T. RODGERS  
21 UNITED STATES MAGISTRATE JUDGE  
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